Summary of SC94462, *G. Steven Cox v. Kansas City Chiefs Football Club*
Appeal from the Jackson County circuit court, Judge James F. Kanatzar
Argued and submitted April 8, 2015; opinion issued September 22, 2015

Attorneys: Cox was represented by Dennis E. Egan of The Popham Law Firm PC in Kansas City, (816) 221-2288; Chad C. Beaver of Beaver Law Firm LLC in Kansas City, (816) 226-7750; and Lewis M. Galloway of LG Law LLC in Kansas City, (816) 442-7002. The Chiefs were represented by Anthony J. Romano, Eric E. Packel, Alison P. Lungstrum, William E. Quirk and Jon R. Dedon of Polsinelli PC in Kansas City, (816) 753-1000.

Several organizations filed briefs as friends of the Court. The Kansas City and St. Louis chapters of the National Employment Lawyers Association were represented by Paul A. Bullman, an attorney in Kansas City, (816) 286-2860; and Mark A. Buchanan of the Law Office of Mark Buchanan in Kansas City, (816) 221-2288. The Missouri Association of Trial Attorneys was represented by Martin M. Meyers of The Meyers Law Firm LC in Kansas City, (816) 444-8500; and Leland F. Dempsey of Dempsey & Kingsland PC in Kansas City, (816) 421-6868.

Overview: A man who sued his former employer for age discrimination appeals the judgment in favor of the employer. In a 5-2 decision written by Judge Laura Denvir Stith, the Supreme Court of Missouri vacates the judgment and remands (sends back) the case. The trial court abused its discretion in issuing a blanket ruling precluding the testimony of 20 other former employees as circumstantial "me too" evidence supporting the man's claim that, like the other employees, he was fired because of his age. The man was not required to plead "pattern or practice" discrimination or hostile work environment discrimination for this "me too" evidence to be relevant to his claim. The court's blanket ruling failed to reference specific facts regarding the proposed witnesses and misapplied the legal standard for admitting evidence by requiring a strict level of similarity to the man instead of weighing various aspects of similarity and making admissibility determinations as to each proposed witness's testimony. The trial court also erred in excluding a former employee's testimony about a statement he overheard the general manager make about older employees. Further, the trial court abused its discretion in not permitting the man to depose the chairman and chief executive officer about certain limited issues.

Judge Zel M. Fischer dissents. He would hold the trial court did not abuse its discretion in determining that, while logically relevant, the probative value of the former employees' testimony was outweighed by the prejudicial effect of confusing the jury regarding the specific act of discrimination for which the employer was on trial. He notes the man cannot litigate a claim of systematic discrimination because he failed to raise such a claim in his complaint to the Missouri Human Rights Commission, which gave him the right to sue.

Facts: In 2008, the Kansas City Chiefs' new chairman and chief executive officer, Clark Hunt, began an organizational restructuring, hiring Scott Pioli as general manager and Mark Donovan as chief operating officer. Donovan, then 43 or 44 years old, was named president in 2011. After

the 51-year-old director of stadium operations was fired in January 2010, Steven Cox – whom the Chiefs had hired in 1998 as a maintenance manager – assumed additional responsibilities, reporting directly to Donovan for several months until two men in their 30s were hired to fill the newly created positions of vice president of stadium operations and director of facilities. In October 2010, the Chiefs fired Cox, then 61 years old, and replaced him with a 37-year-old. After obtaining a right to sue letter from the Missouri Commission on Human Rights, Cox sued the Chiefs for age discrimination, alleging that the Chiefs – starting with Hunt's stated desire to "go in a more youthful direction" – had instituted a company-wide policy of terminating or forcing out older employees to make way for younger replacements. Cox sought to depose Hunt and other Chiefs officials before trial. The trial court did not permit Cox to depose Hunt but did allow him to depose other Chiefs employees. In pretrial proceedings, the trial court ultimately precluded approximately 20 former Chiefs employees from testifying about their ages, the circumstances of their separations from employment, the ages of employees hired to replace them or whether they had filed age discrimination lawsuits against the Chiefs. At trial, Cox presented evidence that Hunt had said he "wanted to go in a more youthful direction," that Donovan had told a 60-year-old employee the employee would have been considered for the position of chief financial officer if he were not "so old," and that another high-level manager said during a January 2011 directors meeting that these "old people around here think they're entitled to everything." Cox also made offers of proof (through testimony elicited outside the jury's presence) for at least 11 of the witnesses precluded from testifying, and Pioli testified during an offer of proof about two more witnesses. Together, the offers of proof presented evidence that, over approximately a year, a number of employees older than 40 years were fired or pressured to resign and their job duties were assumed by younger replacements, most of them younger than 40 years. The trial court overruled Cox's requests to present this evidence to the jury. The jury returned a verdict in favor of the Chiefs. Cox appeals.

VACATED AND REMANDED.

Court en banc holds: (1) The trial court abused its discretion in issuing a blanket ruling excluding circumstantial evidence – the "me too" testimony of the 20 other employees – allegedly fired based on age. To show age was a "contributing factor" in the discriminatory act, as required by Missouri law, plaintiffs generally must rely on circumstantial evidence. To be admissible, evidence must be relevant both logically (tending to make a consequential fact more or less likely; "probative") and legally (its probative value outweighs any prejudicial effect).

> (a) In its blanket ruling excluding the "me too" testimony, it appears the trial court erroneously believed that, because Cox did not plead "pattern or practice" discrimination, evidence that the Chiefs fired other older employees was not relevant to Cox's claim. "Pattern or practice" is a legal term of art in the federal employment discrimination context. While this Court never has addressed whether Missouri law permits such a claim, Missouri law does state that claims of hostile work environment and continuing violations – to which instances of "me too" discrimination against other employees clearly would have been relevant – are similar to federal pattern-or-practice claims. But whether Cox pleaded a hostile work environment claim should not affect the trial court's analysis of whether evidence of "me too" firings of other persons older than 40 years by the Chiefs is relevant as circumstantial evidence supporting Cox's individual

discrimination claim. In the federal context, the United States Supreme Court has held that testimony by nonparty employees about discrimination can be relevant in a single-act discrimination case, that any per se exclusion of such evidence constitutes an abuse of discretion and that admissibility of such evidence must be determined on a case-by-case analysis of multiple factors. The lower federal courts repeatedly have recognized that "me too" evidence is one type of circumstantial evidence that can support an inference of discrimination in a single-act claim such as Cox's. This is the law in Missouri too. That such testimony would have been relevant to a hostile work environment claim or a federal pattern-or-practice claim (had Cox brought such a claim) does not make the testimony less probative or more prejudicial for other purposes. The trial court erred in issuing a single ruling excluding the "me too" testimony of multiple witnesses for whom Cox made offers of proof without reference to specific facts elicited in any offer.

(b) In excluding this testimony, the trial court also misapplied the legal standard for admitting evidence by "me too" witnesses by issuing a blanket ruling requiring the strict level of similarity that would support a disparate treatment claim. In a disparate treatment case, relevance of evidence as to the treatment of coworkers depends on whether those coworkers were similarly situated to the plaintiff. In making such a determination, courts analyze a number of factors, including whether the same supervisor imposed the discipline, whether the coworkers were subject to the same standards and whether they engaged in conduct of similar seriousness. But Cox's is not a disparate treatment case, and the admissibility of "me too" evidence does not require the nonparty employees to be "similarly situated." Rather, courts look to and weigh aspects of similarity as appropriate given the facts, context and theory of the specific case at issue. The dominant common factor between Cox and the "me too" others is their membership in a protected group – he alleged a company-wide policy of age discrimination executed over a period of months, both before and after his own termination. As such, it does not matter whether the coworkers were fired by the same supervisor. Like Cox, the coworkers were older than age 40, were terminated during the period in question and were replaced by younger workers – commonalities making their "me too" evidence relevant and admissible even when they are not similarly situated to Cox in all relevant respects. Even were a common decisionmaker required, Cox presented evidence that at least seven of the employees were fired or forced out by or at the behest of Donovan, the same decisionmaker who ordered that Cox be fired. The trial court's failure to account for the common decisionmaker in excluding these offers of proof itself requires reversal. The trial court also erred in requiring other employees to have at least five characteristics similar to Cox, leading to its improper conclusion that none of these witnesses were similarly situated and then its erroneous blanket determination that the prejudice of introducing this evidence outweighed its probative value in all instances. The trial court erred in excluding these witnesses' evidence as to their ages, the circumstances of their firings or resignations, and the ages of those who replaced them. On remand, the trial court should consider the admissibility of the testimony of each specific witness who may be offered.

(2) The trial court erred in excluding the testimony of the Chiefs' former field security supervisor that he had overheard Pioli tell an unknown person in a stadium hallway: "I need to make major changes in this organization as so many employees … are over 40 years old." Although this is a

stray statement that cannot constitute direct evidence of discrimination, it is relevant circumstantial evidence of what Cox alleges to be the motivation behind his firing, given it was made by Pioli during the time when Cox and others older than 40 were fired and replaced by younger employees. That Pioli did not supervise Cox directly or order his firing does not mean his comments are irrelevant when the theory of the case involves a company-wide policy.

(3) The trial court abused its discretion in not permitting Cox to depose Hunt. This is not a fishing expedition. The Chiefs deny Hunt said he wanted to go in a more youthful direction and deny there was any company-wide effort or direction to replace older workers with younger workers. As such, there are specific questions that only Hunt can answer. That Cox was precluded from deposing Hunt materially affected his presentation of the merits of his case.

Dissenting opinion by Judge Fischer: The author would hold the trial court did not abuse its discretion in excluding the former employees' testimony. Abuse of discretion occurs only when a court's ruling is clearly against the logic of the circumstances then before it. The circumstances then before the trial court were Cox's petition, which claimed only a single act of discrimination in his firing, not a theory of systematic discrimination by the Chiefs. Cox attempted to amend his petition to include a claim of systematic discrimination, but the trial court denied him leave to amend because Cox did not present this theory to the human rights commission. The single act of discrimination claim he presented to the commission is the only one covered in its right to sue letter, and Cox is not entitled to litigate any other claim. Although the former employees' testimony was logically relevant, the trial court did not abuse its discretion when it determined this testimony's probative value was outweighed by the prejudicial effect of confusing the jury regarding the specific act of discrimination for which the Chiefs were on trial.